

An appeal

- by -

Elk Lake Automotive Services Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2001/217

**DATE OF HEARING:** June 15, 2001

**DATE OF DECISION:** June 18, 2001

## DECISION

### APPEARANCES:

David Washington	President, Elk Lake Automotive Services Ltd
Laurie Meyers	Manager, on behalf of Elk Lake Automotive Services Ltd.
Duane Reid	On his own behalf

No one appeared on behalf of the Director

### OVERVIEW

This matter involves an appeal filed on behalf of Elk Lake Automotive Services Ltd. (“the Company”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a determination dated February 22, 2001 (#ER 102-790) by the Director of Employment Standards (“the Director”).

Duane Reid (“Reid”) was employed by the Company from February 3, 1999 to August 16, 2000 to work at the gas station operated by the Company. He worked both in the “shop” helping with automobile repairs and in the retail “store” as a cashier. On his last day of employment a dispute arose between himself and the president of the Company, David Washington (“Washington”) at the conclusion of which Reid left the worksite. Reid claims that he was dismissed but the employer claims that Reid quit his job.

Reid complained about his dismissal and sought compensation for length of service. The Director determined that Reid had been dismissed and was therefore entitled to compensation. The Company appeals this finding on the basis that the Director’s delegate was wrong to conclude that Reid was dismissed. The Company submits that Reid abandoned his job despite being offered work that day.

### FACTS

The parties submitted an amount of written material that I concluded was not relevant to the hearing. This was discussed with the parties at the commencement of the hearing and the hearing proceeded without reference to the material. The material in question related to “work performance” issues in the past. The Company submitted some material relating to prior problems and Reid submitted many letters of reference. However, as it was clear that Reid was not dismissed for poor performance – there had been no prior warnings or discipline – I concluded that these matters were not relevant to the termination issue.

The company operated a service station at which there were service bays where automobile repairs were carried out (the “shop”). The service station had gas pumps and a retail store. Reid was hired to work in both aspects of the business. He preferred to work in the “shop” as he was hoping to get an apprenticeship as an auto repairman. If repair work was slow Reid worked in the retail store (the “front-end”) as a cashier. The hours of work and the rate of pay were identical in both positions.

Washington was the president and owner of the service station. He had a manager who looked after the shop and another manager, Laurie Meyers, who managed the front-end. Ms. Meyers was also the over all second-in-command. She handled all the scheduling and payroll and did most of the hiring and firing. When Washington was absent Ms Meyers was in charge.

The problems that led to the termination of Reid's employment started in the week of August 14, 2000. On Monday the 14th Reid did not show up for work but called in “sick”. He claimed to have sunstroke from a weekend in the sun. At approximately 5:00pm Reid called-in again that he would be available for work the next day. Washington told him to call in the next morning to see if there was sufficient work in the shop.

On Tuesday August 15th Reid called in sometime between 8:00 and 8:15 am. He spoke to Ms Meyers who told him that there was work at the front-end. Reid, as mentioned, preferred to work in the shop and asked to speak to Washington. Washington was not available at that moment but called back to Reid at about 8:20am. Washington was somewhat annoyed that Reid was still at home and had not come to work as there was always work to be done, either in the shop or at the front-end. Reid did not get to work until 8:40 am. When he arrived he put on his “shop” coveralls as if to work in the shop. At that point Washington was again annoyed because Reid had been told and that there was work at the front-end for him that day. Washington sent him home and told him to check in the next morning.

On Wednesday August 16<sup>th</sup> Reid went to work but another confrontation arose with Washington. As there were customers and others staff around Washington asked Reid to attend in his office and asked Ms Meyers to attend as well. Ms Meyers described the meeting as very unpleasant. She said that Reid was just screaming at Washington, was very abusive, and called him a liar. She said that everybody was very upset and that Washington called an end to the meeting and told Reid to leave the office. Reid says that he was told to go home.

Ms Meyers followed Reid outside where Reid was lighting a cigarette. She told him that she really needed him at the front-end that day. She told him that he was scheduled to work there and it was very difficult to get replacements. Reid testified that he told Ms Meyers that he could not work at the front-end because Washington had sent him home. He agreed at the hearing that he knew that Ms Meyers wanted him to work the front-end that he says that he told her that she would have to clear it with Washington.

It is not completely clear how this conversation ended. Ms Meyers says that she was called into the station for an important phone call. Reid says that she went in after he had said that she should check with Washington. At any rate, Reid did not wait for Ms Meyers to return. As soon as he had finished his cigarette he left.

Later that day Ms Meyers discussed the situation with Washington and they concluded that Reid's employment should be terminated as he had left the jobsite when his services were required and his continued attendance was too unreliable.

## ANALYSIS

In this case it is not absolutely clear whether Reid was dismissed for insubordination (calling his boss a liar), quit his job, refused reasonable alternative employment, or was dismissed for unreliability. In some ways it seems that there was an element of each of these reasons leading to the termination of employment. It is clear that the employment relationship was ended by both of the parties.

It was clear to me, and I accept the evidence given by Washington and Meyers, that Reid's behaviour at the workplace on the Wednesday morning was insubordinate and in and of itself gave grounds for dismissal. However, it is not so clear that this was the ground upon which the employment relationship was terminated. Immediately after the altercation Meyers offered Reid work at the front-end. This is a clear indication that Reid was not dismissed at that point. Ms Meyers was the senior manager and trusted second-in-command. Her offer of employment at the front-end was obviously made on behalf of the company despite any earlier comment made by Washington.

Reid's response to Ms Meyer's very definite offer of work is certainly curious. He did not accept the offer but asked Ms Meyers to check with Washington. When she left to do so, Reid walked off the jobsite. He now says he was not quitting but it is difficult to accept this under the circumstances. He did not wait to find out if the front-end work was going to be approved.

The Tribunal has held in the past that the right to "quit" is personal to the employee and that there must be a subjective intention to quit along with some act that confirms the intention: *Re: Valley Alarms and Communications Ltd.* [1997] BCEST #D080/97; *Re: Burnaby Select Taxi Ltd.* [1996] BCEST #D091/96. However, there are occasions upon which the subjective intent can be inferred from the actions of the employee. Where an employee left in the middle of the day after being told that if he did leave, he need not bother coming back, the Tribunal found that he had quit: *Re: Ohyama & Roche Inc.* [1997] BCEST #D490/97. Where an employee left work following an altercation with his supervisor and refused to apologize, the Tribunal held that the employee had quit, based on both subjective and objective in standards: *Re: Laguna Wood craft (Canada) Ltd.* [1997] BCEST #D395/97.

In this case the employee left work following an altercation despite the fact that the manager requested that he stay to work the alternative position at the front-end of the business. The Director's delegate based his decision in part on the following finding:

Concerning whether the complainant was instructed by the front-end supervisor to work the front-end, I accept that she may well have told the complainant, after his discussion with the owner, that he could work the front-end that day. I also accept that, given the preceding discussion, the complainant was likely upset and may well not have heard or understood the instructions conveyed by the front-end supervisor. Based on the evidence, I accept on the balance of probabilities that the complainant's conduct did not amount to a conscious or deliberate refusal to work the front-end.

As the delegate uses the terms "likely upset" and "may well not have heard or understood", it is not clear whether these findings were speculation or based on statements given by the complainant. At the hearing before me the complainant gave evidence that indicated that he clearly understood that Ms Meyers wished him to work the front-end that day and that she was in desperate need of assistance for that shift. Reid initially vacillated but then chose to leave work without any further permission from the owner or the manager. It seems to me that his intentions were clear. He did not intend to work for the company any longer. In short, he quit.

On the evidence before me it was clear that Reid saw the two positions as quite different. He wanted to work in the shop, as he wanted to train and to earn an apprenticeship. He did not want to work at the front-end. However, throughout his employment when work was slow in the shop he would work at the front-end. The hours were the same and his rate of pay was the same. I conclude that the front-end work was reasonable alternative employment as referred to in section 65 (1)(f) of the *Act* which provides that the compensation provision does not apply to an employee who has been offered and has refused reasonable alternative employment by the employer. I conclude that even if Reid did not quit he did refuse reasonable alternative employment.

The burden of persuasion is on the appellant to satisfy me that the Director's delegate was wrong in his assessment of the evidence. I am persuaded that the delegate was wrong in finding that the complainant may not have heard or understood Ms Meyers request that he work the front-end. On the evidence before me it was very clear that the complainant heard and understood very well what Ms Meyers was requesting. He simply chose to leave. I conclude that the employment was terminated by the employee, Mr. Reid, or in the alternative that he was offered and refused reasonable alternative employment by the employer.

**ORDER**

Pursuant to section 115 of the Act I order that the determination is cancelled.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**